Ontario Court of Appeal overturns lower courts, certifies criminal interest cash-advance class action

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Stikeman Elliott

The Court of Appeal for Ontario recently overturned the decisions of two lower courts in *Markson v. MBNA Canada Bank* , which had twice been refused certification as a class action.

The Plaintiff, Markson, alleged that MBNA's transaction fees and interest in connection with cash advances from credit cards are in violation of s. 347 of the *Criminal Code*, which prohibits the charging of "interest" that exceeds a rate of 60% per annum. "Interest" is very broadly defined in the *Criminal Code* to include all charges incurred for the advancing of credit, not limited to interest as commonly understood. In other cases the term has likewise been interpreted very broadly. Markson sought an injunction, damages for breach of contract and a restitutionary remedy in unjust enrichment.

Mr. Justice Cullity of the Superior Court had refused to certify the class action on the grounds that the contractual and restitution claims did not raise common issues and because a class proceeding was not the preferable procedure. The majority of the Divisional Court agreed, with a dissent by Mr. Justice O'Driscoll (see our *Class Action Update*, June 2007).

In the Court of Appeal, Mr. Justice Rosenberg identified the "fundamental issue" as whether a class proceeding would be appropriate where all members of the proposed class were at risk of being charged interest at a criminal rate, but where only a small portion of that group actually were charged interest at that rate - and where, in fact, some members of the class may not mind being charged the interest if it means they can continue to receive cash advances on the cards without restrictions on the size of advances or repayment terms.

As a matter of general principle, Justice Rosenberg disagreed with the position that a class proceeding should not be certified in cases where the defendant had caused widespread but individually minimal harm. This is, in his view, the ideal case for a class action, as it may be the only avenue to redress the wrong and hold the wrongdoer to account.

Justice Rosenberg did agree with the motions judge on certain points. The difficulty and expense to which MBNA would be put in determining which of its customers had, in fact, been charged interest at a criminal rate was a relevant factor in the analysis. If a large number of transactions had to be examined individually, that did suggest that the claims of customers were not suited to a class proceeding - although such a conclusion would have the effect of leaving any wrongdoing undeterred and unpunished.

In order to address the concern that individual examination of claims would not be desirable in a class proceeding (while not conceding that it would be impossible), the proposed representative plaintiff reformulated the claim to provide for an assessment of damages in the aggregate, to be shared amongst

the class on an average or proportionate basis, without proof of individual claims. Justice Rosenberg accepted that this approach was viable, as it would leave no questions of law or fact, except those relating to the assessment of monetary relief, to be determined (as required by s. 24(1)(b) of the *Class Proceedings Act*). To say otherwise would, in his view, permit large institutions that allegedly make large illegal profits from millions of small, individual transactions to be effectively immune from suit by their customers. Entitlement to monetary relief may depend on individual assessments, but certification may still be allowed where potential liability can be established on a class-wide basis.

Justice Rosenberg relied on *Gilbert v. Canadian Imperial Bank of Commerce*, [2004] O.J. No. 4260 (S.C.J.), where a class proceeding was certified and a settlement approved in a case involving allegations of undisclosed and unauthorised charges on foreign exchange transactions on credit-card accounts. The class comprised all cardholders as of a certain date. The settlement amount was apportioned among class members in payments which the judge admitted were arbitrary, and not representative of amounts actually charged or available only to class members with valid claims - but which nevertheless fell within the spirit and intentions of the *Class Proceedings Act*.

Justice Rosenberg also discussed the defendant's argument that the voluntariness of the payment of interest at a criminal rate provided an exemption from *Criminal Code* liability, based on the Supreme Court of Canada's having held in two cases that where such a payment arises from the voluntary act of the debtor (for example, a voluntary mortgage pre-payment), there will be no violation.[1] Justice Rosenberg accepted that the decision to receive a cash advance, when to repay it and whether to make additional credit purchases could be regarded as voluntary acts on the part of the customer, and that the voluntariness defence could therefore be a common issue in the litigation.

With respect to preferable procedure, Justice Rosenberg concluded that refusing to allow the claim to go forward as a class proceeding would deprive MBNA's customers of the ability to obtain disgorgement of the bank's profits, which would not be available to them if the plaintiff were obliged to pursue an individual action. The preferability analysis ought to consider the three advantages of class proceedings (promoting judicial economy, access to justice and behaviour modification) in light of the common issues seen in context, other available procedures, and whether a class proceeding would be a fair, efficient and manageable method of advancing the claim - and not, as the motions judge appeared to have done, to analyse each of these principles separately. Here, the Court of Appeal concluded that consideration of the preferability principles as a whole strongly weighed in favour of certification.

Unfortunately, the decision leaves uncertain the issue of what constitutes an inappropriate charge that may be characterized as a criminal rate of interest.

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1 *Degelder Construction Co. v. Dancorp Developments Ltd.,* [1998] 3 S.C.R. 90; *Nelson v. C.T.C. Mortgage Corp*., [1986] 1 S.C.R. 749.